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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina

Addendum

Mission to Japan (16–19 July 2013)* **

Summary

The Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, visited Japan from 16 to 19 July 2013 to assess, inter alia, the contribution of its official development assistance to the realization of economic, social and cultural rights and the right to development, as well as the attainment of the Millennium Development Goals. He also considered the extent to which human rights standards are reflected in Japanese international development cooperation and transactions backed by Japanese export credits.

Japan has a commendable international development cooperation programme, which focuses on enhancing the capacity of its partner countries to be self-reliant and ensuring that individuals and communities are free from fear and want. However, the programme could be strengthened by integrating a human rights-based approach. This would require an explicit commitment to incorporating human rights into the formulation, implementation and monitoring of Japanese development assistance policies and programmes, as well as a focus on addressing the root causes of poverty, insecurity and underdevelopment.

* Late submission.

** The summary of the present report is circulated in all the official languages. The report itself, contained in the annex to the summary, is circulated in the language of submission only.

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Annex

[English only]

Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, on his mission to Japan (16–19 July 2013)

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I. Introduction

1. The Independent Expert conducted an official visit to Japan from 16 to 19 July 2013 to assess the impact of its international development cooperation on the realization of human rights, as well as the extent to which human rights are reflected in its development cooperation policy. He also examined concerns related to the human rights and social impacts of investment projects backed by Japanese export credits and how they have been addressed by the country's export credit agencies.

2. The Independent Expert met with a broad range of stakeholders, including representatives of the Ministries of Foreign Affairs; Finance; Economy, Trade and Industry; and representatives of Japan International Cooperation Agency, Nippon Export and Investment Insurance, and Japan Bank for International Cooperation. At the invitation of the Government, he observed a policy dialogue meeting between the Ministry of Foreign Affairs and Japanese non-governmental organizations (NGOs). He also met with civil society organizations, United Nations agencies and local experts on issues within his mandate.

3. He wishes to express his gratitude to all of his interlocutors for sharing their perspectives. In particular, he is grateful to the Government of Japan for its invitation and willingness to engage in constructive dialogue.

II. Analytical context: The obligation of international assistance and cooperation

4. Japan has ratified key international human rights treaties[1] such as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, both of which enshrine a fundamental principle of human rights law, international assistance and cooperation.[2] This provides the context for the assessment of Japanese international development cooperation policy undertaken in the present report.

5. In its general comment No. 3 (1990) on the nature of States parties' obligations, the Committee on Economic, Social and Cultural Rights affirmed that "international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States" which is "particularly incumbent upon those States which are in a position to assist others in this regard" (para. 14). Similarly, in its general comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, the Committee on the Rights of the Child recommended that assistance provided by States should be rights-based (para. 61).

6. The obligations of international assistance and cooperation require States to conduct their activities with due regard for the human rights of the peoples of other States.[3] In that

[1] Japan is a party to all the core international human rights treaties except the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of Persons with Disabilities.

[2] See the International Covenant on Economic, Social and Cultural Rights, arts. 2 (1) and 23, and the Convention on the Rights of the Child, art. 4. The principle is also reflected in arts. 1 (3) and 56 of the Charter of the United Nations and art. 3 (3) of the Declaration on the Right to Development.

[3] See Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, principles 3, 8 and 28–35, and Olivier De Schutter and others, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and

regard, States must "scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation" and must "act as advocates of projects and approaches which contribute not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights".[4] This implies that economic, social and cultural rights should be afforded due attention in all international agreements, whether bilateral or multilateral.

7. In implementing their development cooperation policies and programmes, including the provision of official development assistance (ODA), States must ensure that such policies and programmes are consistent with human rights standards and principles, including the principles of non-discrimination, participation, transparency and accountability.

8. In particular, as the Committee on Economic, Social and Cultural Rights has stated, any development assistance States provide should help partner countries to comply with their own human rights obligations (E/C.12/2001/10, paras. 16–17). States have an obligation to ensure that third parties involved in the delivery and implementation of their development assistance, such as private contractors and technical advisers, do not interfere with the enjoyment and realization of human rights in partner countries.[5]

III. International development cooperation programme

A. Development cooperation policy

9. The international development cooperation policy of Japan is guided by its Official Development Assistance Charter of August 2003,[6] which is underpinned by five basic principles: supporting the self-help efforts of developing countries, focusing on human security, assurance of fairness, utilization of Japanese experience and expertise, and partnership and collaboration with the international community. The overarching objective of Japanese development cooperation is to contribute to the peace and development of the international community, and thereby help ensure the security and prosperity of Japan.

10. The Charter identifies four priority issues: poverty reduction, sustainable growth, addressing global issues and peacebuilding.[7] In order to reduce the vulnerabilities faced by

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Cultural Rights", *Human Rights Quarterly*, vol. 34 (2012) pp. 1084–1169. See also Organization for Economic Cooperation and Development, Development Assistance Committee, "DAC action-oriented policy paper on human rights and development" (2007), principle 8. Available from www.oecd.org/development/governance-development/39350774.pdf.

[4] Committee on Economic, Social and Cultural Rights, general comment No. 2 (1990), para. 6.

[5] Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002), para. 33.

[6] See www.mofa.go.jp/policy/oda/reform/revision0308.pdf.

[7] According to the Ministry of Foreign Affairs, the key priorities of development cooperation are identified annually. In 2013, they were to: (a) realize a prosperous and stable international community with freedom; (b) support emerging/developing economies to grow together with Japan; and (c) promote human security and strengthen trust in Japan. Specific efforts to realize those priorities included providing assistance to countries which shared universal values and strategic interests with Japan, developing in partner countries infrastructure systems designed by Japan, addressing environmental and climate change issues and contributing to achieving the Millennium Development Goals and the post-2015 development agenda. See www.mofa.go.jp/policy/oda/oda_policy/pdfs/priority_policy_13.pdf.

people, communities and countries, Japan addresses the priority issues identified in the Charter bearing in mind the notion of human security, which is a defining feature of its official development assistance programme.

11. Promoting human security entails focusing on individuals and building societies in which everyone can live with dignity by protecting and empowering individuals and communities that face actual or potential threats. In practice, that means: (a) protecting individuals from fears, such as conflict, terrorism, crime, human rights violations, displacement, disease epidemics, environmental destruction, economic crises and natural disasters, and from wants, such as poverty, hunger, and lack of educational and health services; and (b) establishing mechanisms that empower people so that they can address those threats.[8]

12. The concept of human security resonates with the three pillars of the United Nations, namely, peace and security, development, and respect for human rights. The Independent Expert considers that the concept requires further elaboration if it is to contribute to the effectiveness and sustainability of Japanese development assistance. In addition, the concept has an accountability deficit in that it is not underpinned by any legally binding or enforceable standards.

13. The Japanese ODA Charter is supplemented by the Japanese medium-term policy on ODA and its Country Assistance Programmes, which are formulated and implemented in accordance with the Charter. There are also sector-specific development policies and initiatives which, in 2011, focused on several issues including gender, education, health care, water and sanitation, environment, trade and investment and disaster risk reduction.

14. The bulk of Japanese ODA is provided in the form of bilateral aid, reflecting its importance as a foreign policy instrument. Japan utilizes three main channels for its bilateral development assistance: (a) loans with concessional conditions for interest and repayment; (b) grants, typically for projects, emergencies and food aid; and (c) technical cooperation involving training courses and despatch of Japanese experts and technical advisors. In 2012, its gross bilateral ODA disbursements amounted to US$ 14.46 billion. Of that amount, US$ 7.7 billion (53.3 per cent) was provided in the form of loans, US$ 3.92 billion (27.1 per cent) as grant aid and US$ 2.84 billion (19.7 per cent) in the form of technical cooperation.

15. The relatively high use of loans reflects the belief of Japan that the requirement to repay encourages recipients to be fiscally responsible and to allocate resources more efficiently. This links with its emphasis on promoting self-reliance among its partner countries.

16. In 2011–2012, the grant element of Japanese ODA was, at 88.8 per cent, lower than the Organization for Economic Cooperation and Development (OECD) average (95.2 per cent).[9] For development loans, the grant element was 75.5 per cent, but reached 98.4 per cent for ODA to least developed countries. In 2012, 71 per cent of all Japanese ODA was untied, 11.6 per cent was tied and for 17.4 per cent of its ODA, the tying status was not reported.[10] While Japan meets the 2001 OECD-Development Assistance Committee (DAC)

[8] See the Japanese medium-term policy on official development assistance, para. 2 (1) (ii). Available from www.mofa.go.jp/policy/oda/mid-term/policy.pdf. See also General Assembly resolution No. 66/290 on follow-up to paragraph 143 on human security of the 2005 World Summit Outcome (A/RES/66/290).

[9] OECD-DAC 2012 statistics, table 20 "Financial Terms of ODA Commitments". Available from www.oecd.org/dac/stats/statisticsonresourceflowstodevelopingcountries.htm.

[10] Ibid., table 23 "Tying Status of ODA by Individual DAC Members, 2012".

recommendations to untie aid, its loan assistance is overwhelmingly directed to infrastructure projects in partner countries where there are Japanese business interests.[11] The use of ODA to build international friendships and alliances and to promote Japanese interests and business overseas may, as OECD has cautioned, sometimes "override its primary development objective".[12]

17. About one third of Japanese ODA is provided to multilateral organizations. The largest recipients are the World Bank (US$ 1.55 billion) and regional development banks (US$ 969 million), followed by United Nations agencies (US$ 679 million).

18. In recent years, Japanese ODA has been declining.[13] It fell from US$ 11.06 billion in 2010 to US$ 10.83 billion in 2011 and US$ 10.60 billion in 2012. Its net ODA disbursements in 2012 represented 0.17 per cent of its gross national income (GNI), which is well below the OECD average of 0.32 per cent of GNI and significantly below the United Nations target of 0.7 per cent.

19. The Independent Expert acknowledges the economic and fiscal challenges Japan has been facing as a consequence of the global economic crisis and recent natural disasters which the country has suffered, such as the Great East Japan Earthquake in March 2011. He commends the Government for continuing to accord priority to ODA despite those setbacks. He urges the Government to set out a road map for progress towards the United Nations ODA/GNI target of 0.7 per cent as its economic and fiscal situation improves.[14]

B. Institutional framework

20. The main implementing agency of Japanese ODA is the Japan International Cooperation Agency (JICA), the world's largest bilateral aid agency. JICA works in over 150 countries and has some 100 offices around the world. It provides bilateral aid in the form of technical cooperation, loan aid and grant aid.[15] In October 2008, ODA loans, which were formerly administered by Japan Bank for International Cooperation, and grant aid, which was formerly under the supervision of the Ministry of Foreign Affairs, were integrated into the portfolio of JICA. In the fiscal year 2011, technical cooperation implemented by JICA amounted to ¥188.9 billion, grant aid to ¥107.6 billion, and loan aid disbursements of ¥609.7 billion were provided to 51 countries. JICA also administers Japan Oversees Cooperation Volunteers programmes and dispatches disaster relief teams in response to requests from governments of affected countries.

21. Other government departments, including the Ministries of Finance; Education, Culture, Sports, Science and Technology; and Economy, Trade and Industry also provide development assistance. For example, contributions to the World Bank and multilateral development banks are provided through the Ministry of Finance, while support to United Nations agencies and programmes falls under the Ministry of Foreign Affairs. The Ministry of Education mainly provides scholarship support to students from developing countries to study in Japan, while most funds channelled through the Ministry of Economy, Trade and

[11] Japan International Cooperation Agency, *Annual Report 2012*, pp. 193–196. Available from www.jica.go.jp/english/publications/reports/annual/2012/c8h0vm00002qe6vj-att/all.pdf.

[12] OECD, *Japan: Development Assistance Committee (DAC) Peer Review*, 2010, p. 30. Available from www.oecd.org/dac/peer-reviews/45470028.pdf.

[13] This is not unique to Japan.

[14] In 2002, at the International Conference on Financing for Development, Japan committed to make concrete efforts towards the 0.7 per cent ODA/GNI target, but did not set a timeline for reaching it.

[15] For more information on JICA, see www.jica.go.jp/english/.

Industry are used to dispatch experts to developing countries to improve the environment for trade and investment and to disseminate successful Japanese technologies.[16]

C. The role of civil society

22. The Government of Japan has a robust policy of engagement with local civil society organizations in relation to its international development cooperation programme. Since 1996, the Ministry of Foreign Affairs has hosted regular meetings with NGOs which are aimed at promoting a stronger partnership and dialogue on ODA policies and funding assistance for NGOs.[17] The Independent Expert thanks the Government for extending an invitation to him to observe one such meeting during his visit.

23. Beginning in 2002, meetings involving staff of Japanese embassies, other development assistance organizations and Japanese NGOs that work in developing countries have been held with a view to exchanging ideas concerning the efficient and effective implementation of Japanese ODA.[18] In addition, JICA holds meetings with civil society organizations in Japan and in partner countries in order to promote their participation in the Japanese development cooperation programme.[19]

24. Those initiatives are commendable. Nevertheless, dialogue and support for local civil society organizations in partner countries should be strengthened so as to empower them to undertake more effectively their critical role in fostering the accountability of their governments for development assistance received.

25. The Government of Japan recognizes that partnerships with NGOs in partner countries contribute not only to the socioeconomic development of those countries, but also to strengthening their civil societies. To that end, it provides Grant Assistance for Grass-Roots Human Security Projects.[20] Nevertheless, from the information available on the website of the Ministry of Foreign Affairs, it does not appear that local or international human rights organizations have received much support.[21] While there were several projects with a focus on women, children or persons with disabilities, it is unclear whether those projects focus specifically on the protection of the rights of those or other marginalized groups. It is critical that support is provided to the projects of local civil society actors representing vulnerable and disadvantaged groups in order to enable them to engage in dialogue with policymakers and enhance their capacity to assert their rights through existing judicial and other procedures at national or international level.

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[16] For more details, see the Ministry of Foreign Affairs publication, *Japan's Official Development Assistance White Paper 2012*, pp. 182–9. Available from www.mofa.go.jp/policy/oda/white/2012/pdfs/0401_2.pdf.

[17] Ministry of Foreign Affairs, *Japan's Official Development Assistance White Paper 2011*, p. 140. Available from www.mofa.go.jp/policy/oda/white/2011/pdfs/28_oda_wp_2011.pdf.

[18] Ibid., pp. 140–141.

[19] Ibid., p. 141.

[20] Ibid., p. 143. In 2011, government financial support to NGOs was US$ 369 million. Nonetheless, the percentage of Japanese ODA provided to NGOs remains low in comparison to other OECD-DAC countries. During 2010–2011, only 1.9 per cent of its ODA went to NGOs compared with an average of around 12.1 per cent for other OECD-DAC members. Around half of Japanese support for NGOs is provided or channelled through civil society organizations in Japan, while around 20 per cent of the ODA budget goes to international NGOs, and NGOs located in developing countries receive around 35 per cent. See OECD, *Aid for CSOs*, October 2013, pp. 6–7. Available from www.oecd.org/dac/peer-reviews/Aid%20for%20CSOs%20Final%20for%20WEB.pdf.

[21] See www.mofa.go.jp/mofaj/gaiko/oda/data/zyoukyou.html.

D. Private sector involvement

26. A key priority of Japanese international cooperation policies is the promotion of private sector-led growth. According to the ODA White Paper 2011, "Japanese private companies' activities in developing countries make a significant contribution beyond ODA projects, by creating opportunities for local employment, augmenting tax revenue, expanding trade and investment, contributing to the acquisition of foreign currency, and transferring Japan's superior technology".[22] In April 2008, Japan announced a policy to strengthen partnership between ODA and private investment, and to promote private sector business activities in developing countries. In addition, the Independent Expert notes that the Tokyo International Conference on African Development held in June 2013 also emphasized the role of foreign direct investment in contributing to development, which is laudable. However, it is equally important that attention is paid to enhancing the capacities of local businesses in partner countries to be internationally competitive.

27. The Independent Expert is of the view that efforts designed to boost Japanese foreign investments, including economic partnership agreements, should be consistent with relevant international human rights standards including the guiding principles on foreign debt and human rights (A/HRC/20/23, annex), the Guiding Principles on Business and Human Rights (A/HRC/17/31, annex) and relevant international labour standards.

28. Consideration should also be given to ensuring more comprehensive regulation of Japanese foreign business activities to address issues such as tax evasion and other forms of capital flight which undermine the capacity of countries to mobilize sufficient domestic resources for their development. Such an approach would be consistent with the principle of self-help, which is a key element of Japanese ODA policy, and would also contribute to international efforts to tackle illicit financial flows.

E. Debt relief

29. Although initially reluctant to support the idea of debt cancellation for highly indebted countries, Japan has provided significant bilateral debt relief and contributed to multilateral debt relief efforts.[23] Since 2003, it has cancelled ODA and non-ODA related debts amounting to US$ 18.37 billion.[24]

30. The Independent Expert commends the Government of Japan for its debt relief efforts, including those at the multilateral level. He would, however, like to draw the attention of the Government of Japan to the fact that existing multilateral debt relief initiatives show a mixed record, and have not been able to fully address the underlying causes of the debt crisis. Thus, in his report to the twenty-third session of the Human Rights Council (A/HRC/23/37), the Independent Expert called upon the international community to consider solutions that could help deliver an equitable and durable solution to the debt crisis. He urges the Government to use its influence in multilateral institutions, such as the

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[22] *Japan's Official Development Assistance White Paper 2011*, p. 141.

[23] The Government was concerned that debt cancellation would reduce the credibility of developing countries and limit their ability to borrow from international financial markets. In addition, article 8 of the Japanese Finance Act prohibited cancelling a part or all of any country's debt unless new legislation was passed requiring parliamentary approval for any debt cancellation. See Junichi Hasegawa, "International debt management: Japan's policy towards Africa", in *Japan and Africa. Globalization and foreign aid in the 21st century*, Howard P. Lehman, ed. (New York, Routledge, 2010).

[24] Information provided to the Independent Expert by the Ministry of Foreign Affairs.

World Bank, the International Monetary Fund and the Asian Development Bank, to ensure that the provision of loans or debt relief is not conditional on the implementation of unduly onerous policies that may undermine the sustainability and ownership of recipient countries' development efforts. In that regard, he encourages the Government to promote the use by the international financial institutions of the guiding principles on foreign debt and human rights, which were endorsed by the Human Rights Council in June 2012, to inform the design and implementation of their policies and programmes on lending and debt relief.

31. Additionally, in order to safeguard the gains from multilateral debt initiatives and to prevent inequitable burden sharing among creditors, it is important that all States enact legislation to curb the predatory activities of vulture funds.[25] There is currently no evidence of vulture fund litigation against States before the Japanese courts. Nonetheless, the Independent Expert urges the Government to take pre-emptive measures against such a possibility by enacting legislation that would limit the ability of vulture funds to use the Japanese courts to recover extortionate amounts from poor countries, in the process eroding the gains from international debt relief efforts to which Japanese taxpayers have contributed.

IV. Export credits and human rights

A. Export credit agencies

32. As is the case with most OECD member countries, Japan seeks to promote overseas investments and exports, as well as to maintain the international competitiveness of its industries through export credits.[26] It has two official export credit agencies: Japan Bank for International Cooperation (JBIC) and Nippon Export and Investment Insurance (NEXI), both of which are wholly owned by the State.

33. JBIC is a policy-based financial institution established under the Japan Bank for International Cooperation Act (Act No. 39 of 2011). It mainly provides various types of loans[27] for projects aiming at overseas development and securing of resources such as oil, liquefied natural gas, iron and copper, which are important for Japan, and maintaining and improving the international competitiveness of Japanese industries.[28] It also aims to support projects undertaken outside Japan that have a favourable impact on the preservation of the global environment or are aimed at preventing global warming. It is supervised by the Minister of Finance.

34. NEXI mainly provides various types of insurance to cover political and commercial risks involved in business or overseas transactions, such as export, import, investment and financing, which private insurance cannot cover.[29] In 2011, NEXI underwrote ¥7.1 trillion in export credit insurance.

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[25] See the report of the Independent Expert to the Human Rights Council (A/HRC/14/21).

[26] Export credits are government-backed loans which support companies doing business abroad, particularly for high-risk projects. Collectively, they are one of the world's largest sources of public financing for private sector projects.

[27] Such loans include overseas investment loans (60 per cent of its commitments); guarantees to supplement or encourage financing for private financial institutions (14 per cent); export loans (13 per cent); and import loans (11 per cent). Their total value was ¥1,595 billion in 2011.

[28] For more information, see www.jbic.go.jp/en/.

[29] The competent authority for NEXI is the Minister of Economy, Trade and Industry. For more

B. Human rights issues

35. While export credit agencies serve an important function in international trade and investment, they also raise important concerns, including the exacerbation of poor countries' debt problems and negative impacts on human rights and the environment, as explained in the 2011 report of the Independent Expert to the General Assembly (A/66/271). In addition, export credit agencies tend to be secretive and often lack transparency and accountability in their funding decisions and operations.

36. JBIC and NEXI have been involved in projects such as the Coral Bay Nickel Processing Plant Project, the Taganito Processing Plant Project and the San Roque Multipurpose Dam Project[30] in the Philippines; the Baku-T'bilisi-Ceyhan oil pipeline (BTC pipeline);[31] and the Papua New Guinea Liquefied Natural Gas Project,[32] all of which have generated a great deal of controversy. For example, it has been alleged that the BTC pipeline posed a number of environmental and human rights risks, and violated the safeguard policies of the World Bank.[33] In a similar vein, several environmental and human rights concerns have been raised in relation to the Coral Bay Nickel Project, including the lack of prior and informed consent from indigenous peoples, the impact on coral reefs and the leakage of hazardous waste from the tailing dams.[34]

C. Measures to address human rights and other concerns

37. The Independent Expert notes that NEXI and JBIC both have guidelines on environmental and social considerations.[35] The guidelines, which largely correspond to the safeguard policies of the World Bank, are based on the OECD Recommendation of the Council on Common Approaches for Officially Supported Export Credits and

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information on NEXI, see http://nexi.go.jp/en/.

30 Rivers Watch East and Southeast Asia, International Rivers Network and Friends of the Earth Japan, "Development Disasters: Japanese-Funded Dam Projects in Asia", 2003. Available from www.internationalrivers.org/files/attached-files/030309.irnjbic.pdf. NEXI was not involved in the San Roque Multipurpose Dam Project.

31 Apart from the International Finance Corporation and the European Bank for Reconstruction and Development, several export credit agencies were involved in the project, including the Export Credits Guarantee Department (ECGD) (United Kingdom), Euler Hermes (Germany), Compagnie Française d'Assurance pour le Commerce Extérieur (COFACE) (France), Servizi Assicurativi del Commercio Estero (SACE) (Italy) and the Export-Import Bank of the United States (Ex-Im Bank).

32 See Jubilee Australia, "Pipe Dreams: The PNG LNG Project and the Future Hopes of a Nation", 2012. Available at www.jubileeaustralia.org/LiteratureRetrieve.aspx?ID=112463. Other export credit agencies involved in the project are the Export-Import Bank of China, the Export Finance and Insurance Corporation (Australia), SACE (Italy) and Ex-Im Bank (United States). See www.eca-watch.org/publications/newsletter-items/ngos-warn-banks-not-to-further-finance-png-lng-project.

33 See, for example, www.thecornerhouse.org.uk/resource/bp-violating-human-rights-rules-says-uk-government.

34 See www.foejapan.org/en/aid/jbic02/rt/index.html.

35 NEXI, "Guidelines on Environmental and Social Considerations in Trade Insurance", July 2009. Available from www.nexi.go.jp/en/environment/social/. JBIC, "Guidelines for Confirmation of Environmental and Social Considerations", April 2012. Available from www.jbic.go.jp/wp-content/uploads/page/efforts/environment/confirm_en/pdf_01.pdf. See also JICA, "Guidelines for Environmental and Social Considerations", April 2010. Available from www.jica.go.jp/english/our_work/social_environmental/guideline/index.html. The term "environmental and social considerations" refers not only to the natural environment, but also to social issues such as involuntary resettlement and respect for the human rights of indigenous people (JBIC Guidelines, p. 1).

Environmental and Social Due Diligence ("the Common Approaches"). They are designed to prevent or mitigate the negative environmental and social impacts of development projects supported by NEXI and JBIC. According to the guidelines, partner countries, borrowers or other project proponents bear ultimate responsibility for environmental and social considerations of projects, but both agencies encourage their partners to take remedial measures to address the social and environmental impacts of the projects that they support.

38. It is notable, however, that neither set of guidelines offers an effective accountability mechanism. Although the guidelines provide for a procedure allowing affected persons to raise their concerns with an independent panel, the panel can only make non-binding recommendations.[36] Moreover, under the NEXI Guidelines, the examiner works under the direct control of the Chairman and Chief Executive Officer of NEXI.[37] It is also notable that the objections procedures have rarely been used,[38] suggesting that they are not well known by the affected groups or communities.

39. Those omissions should be addressed as a matter of priority. While the Independent Expert is of the view that that the existing guidelines offer some degree of protection, he believes that they could be significantly enhanced through explicit references to the international human rights obligations of Japan as well as international labour standards.

40. As a member of OECD, Japan subscribes to the Common Approaches. However, the Common Approaches are not legally binding and fail to explicitly require export credit agencies and their clients to commit clearly and unambiguously to respect human rights and establish adequate human rights due diligence processes. Moreover, the Common Approaches have failed to prevent export credit agencies from supporting a range of egregious projects.

41. States where an export credit agency-supported project is implemented have the primary responsibility to ensure that the project activities comply with their international human rights obligations. However, it is important to note that the agency's home State is also responsible for the regulation and supervision of the activities carried out by the national export credit agency that have a negative impact on the enjoyment of the human rights of the population of the host State. As noted by the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, "States should take steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies ... including, where appropriate, by requiring human rights due diligence" (A/HRC/17/31, annex, principle 4).

42. As State-owned entities, NEXI and JBIC are bound by the international human rights obligations of Japan. Ensuring compliance with human rights standards is therefore not a voluntary undertaking in support of a partner country, but a legal obligation derived from the human rights obligations binding on Japan and its public institutions, including its State-owned agencies.

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[36] See www.jica.go.jp/english/our_work/social_environmental/guideline/pdf/objection100326.pdf; http://nexi.go.jp/en/environment/objection/pdf/08b_1.pdf; and www.jbic.go.jp/en/efforts/environment/disagree/procedure.

[37] NEXI, "Annual Report FY 2011", July 2012, p. 16. Available from http://nexi.go.jp/corporate/booklet/pdf/annual2011-e.pdf.

[38] For example, only two objections have been lodged under the JBIC objections procedure. See the annual reports of the Examiners for Environmental Guidelines, available from www.jbic.go.jp/en/efforts/environment/disagree/procedure.

43. The Independent Expert urges the Government of Japan to take steps to strengthen the JBIC and NEXI guidelines by, inter alia, including requirements for comprehensive human rights impact assessments, in addition to the environmental and social impact assessments already required, and ensuring the free, active and meaningful participation, rather than mere consultation, of the affected communities.

44. Another aspect requiring attention is the lack of transparency concerning the contracts between those agencies and their clients. Non-disclosure of such contracts has been justified by reference to commercial confidentiality. In the Independent Expert's estimation, however, since the agencies are public entities, there is a duty to account to the Japanese public and to the citizens of the countries where the projects they support are located. Transparency would increase the accountability of the agencies to both the Japanese public and the citizens of the host countries and would ultimately assist Japan in complying with its extraterritorial human rights obligations, as well as the obligations of international assistance and cooperation.

V. Japanese official development assistance: Its impact on the realization of human rights and the Millennium Development Goals

A. Development assistance policy and human rights

45. The Japanese ODA Charter explicitly refers to the importance of working with countries that respect, protect and fulfil human rights. It underlines that "Japan will give priority to assisting developing countries that make active efforts to pursue peace, democratization, and the protection of human rights, as well as structural reform in the economic and social spheres".[39] It also places emphasis on the protection of individuals, their empowerment, attention to the condition of the socially vulnerable and closing the gap between the rich and the poor. Furthermore, it stresses the importance of gender equality and improving the status of women and their active participation in development.

46. The Japanese Initiative on Gender and Development, adopted in March 2005, outlines the current approach to gender mainstreaming.[40] The document stresses that "Japan will seek to promote gender mainstreaming broadly in its ODA and throughout the process of needs assessment, policy formulation, project formulation, implementation, monitoring and evaluation".[41] The policy indicates that that a gender equality perspective will be fully taken into account when country assistance programmes or sector or issue specific policies are formulated and that gender issues will be shared with recipient countries in policy dialogues. It underlines the need for gender analysis and promoting women's as well as men's participation in decision-making at the stages of planning, implementing and evaluating ODA policies and projects affecting their lives. The Initiative also incorporates assistance for policies and institutions that promote gender equality at the international and national level. This includes support in the "formulation of national policy on the advancement of women; institutional strengthening of national machinery; establishing

[39] Japanese ODA Charter, sect. I (2) (1).

[40] Initiative on Gender and Development. Available from www.mofa.go.jp/policy/oda/category/wid/gad.html.

[41] Ibid., sect. 2.

legal and institutional frameworks from a gender perspective; upgrading gender statistics; gender awareness-raising of government officials through gender training."[42]

47. Poverty reduction is another priority issue identified in the Charter and in the Medium-Term Policy on Official Development Assistance. The Charter stresses that "Japan will give high priority to providing assistance to such sectors as education, health care and welfare, water and sanitation and agriculture".[43] The Medium-Term Policy identifies direct assistance to the poor as one avenue for poverty reduction. This includes "strengthening the capabilities of the poor and of communities so as to enable the poor to participate in the formulation of aid policies, in project planning and in the implementation process".[44] The Policy mentions that "it is important to establish institutions and policies that protect the rights of the poor based on the principle of equality under the law, and to enable the poor to participate in political activities and to exercise their capabilities. Assistance will therefore be provided to contribute to the protection of human rights, the rule of law, and the promotion of democratization".[45]

B. Impact on the realization of human rights

48. It has been asserted that Japan lacks a comprehensive and coherent strategy to contribute to the promotion, protection and fulfilment of human rights in its official development cooperation. According to one observer, Japanese human rights diplomacy differs from that of other developed countries, such as the United States and the member States of the European Union, in that it is based on a "non-intrusive and accommodative approach, which is largely compatible with ASEAN's [Association of Southeast Asian Nations] diplomatic style" and that "at least in relative terms, Japan makes little effort to promote human rights in Southeast Asia".[46] In a similar vein, Human Rights Watch points to the cautious approach to human rights diplomacy adopted by Japanese officials, arguing that it is motivated by a desire to avoid jeopardizing "friendly relations with other countries, harming Japan's economic interests or risking criticism of Japan's war record".[47]

49. It is difficult, in the absence of comprehensive information from the countries receiving Japanese ODA, to assess the extent to which Japanese official development assistance impacts on the realization of human rights in such countries. It can be argued, however, that Japanese development assistance does contribute to the realization of economic, social and cultural rights in its partner countries. Projects implemented to reduce poverty through the establishment of social security schemes, promoting education, strengthening health care or providing access to clean drinking water contribute to the realization of the rights to social security, education, health or safe drinking water and sanitation, respectively. In 2009, Japanese human rights-related bilateral ODA disbursements were allocated to: health and welfare (US$ 354.45 million), gender equality (US$ 1,870.75 million) and measures relating to persons with disabilities (US$ 1,687.46 million).

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[42] Ibid., sect. 2 (3).

[43] Japanese ODA Charter, sect. I (3) (1).

[44] Medium-Term Policy on Official Development Assistance, 4 February 2005, sect. 3 (1) (ii) (b). Available from www.mofa.go.jp/policy/oda/mid-term/policy.pdf.

[45] Ibid., sect. 3 (1) (ii) (d) (i).

[46] Hiro Katsumata, "Why does Japan downplay human rights in Southeast Asia?", *International Relations of the Asia-Pacific*, vol. 6, No. 2 (2006), p. 250.

[47] Kenneth Roth and Kanae Doi (Human Rights Watch) "The Sun Rises on Human Rights," *New York Times*, 12 April 2013. Available from www.hrw.org/news/2013/04/12/sun-rises-human-rights.

50. It can also be argued that the particular efforts of Japan in disaster risk reduction protect human rights, since the ultimate aim of disaster risk reduction is not only to protect social and economic infrastructure from earthquakes, floods or other natural disasters, but to prevent loss of life and other harm to individuals. Such assistance may therefore contribute to the protection of the right to life and to physical integrity in the event of a natural disaster.

51. Nevertheless, a review of Japanese development cooperation at project level does not lead to clear conclusions concerning the human rights impacts of the country's development assistance.[48] While it can be argued that the overall aim of Japanese development cooperation is to support partner countries in one way or the other in their efforts to realize economic, social and cultural rights, human rights do not feature as prominently in bilateral development cooperation, either at policy or at project level. Very few projects can be identified as having the explicit aim to strengthen human rights, the rule of law or transitional justice, to train public officials on human rights issues or empower rights holders to claim their rights through justice mechanisms at local, national or international level. Thus, for instance, while it should be noted that Japan has contributed substantial funds to the Extraordinary Chambers in the Courts of Cambodia and supported that country's efforts in rebuilding its own legal system, efforts appear to be mainly focused on drafting basic civil and economic laws in Cambodia and several other partner countries; in that context, human rights appear not to be a major focus of Japanese assistance in the legal field.

52. While equality, human rights, the participation of the poor in political activities and the protection of the rights of the poor form part of the Japanese official poverty reduction strategy, those principles do not appear to receive much attention at project level. Furthermore, the emphasis given to poverty reduction, education, health care and welfare in policy documents is less discernible when considering which sectors receive the largest share of Japanese ODA. Nearly half of all ODA funds are devoted to economic infrastructure including transport, communications and energy or for projects related to industry, mining and construction. While those funds are also spent on small-scale infrastructure projects, most of the assistance relates to large-scale infrastructure projects. In 2011, education and health care, to which Japan devotes high priority according to its Medium-Term Policy, received a combined total of 8.4 per cent of all ODA funds.[49] Even in the education sector, approximately 70 to 90 per cent is reported to be spent on teachers' salaries,[50] while assistance devoted to basic education is limited to 0.5 per cent of all bilateral aid.[51]

53. Japan attaches a great deal of importance to the promotion of human rights through dialogue and cooperation based on mutual understanding and respect.[52] In that regard, it has held regular bilateral dialogue and consultations on human rights with the governments of more than 10 countries. In situations of concern, Japan deals cautiously with implementing

[48] See www.mofa.go.jp/mofaj/gaiko/oda/data/zyoukyou.html (in Japanese).

[49] OECD-DAC 2011 statistics, table 19 "Aid by Major Purposes".

[50] Estimate provided by Japan NGO Network on Education (JNNE).

[51] OECD-DAC 2011 statistics.

[52] According to the Ministry of Foreign Affairs, the Government provides assistance in accordance with its ODA Charter, with due regard for the principles of the Charter of the United Nations, including respect for sovereignty, equality and non-intervention in domestic affairs, and after "comprehensively determining the recipient country's needs, socioeconomic conditions and its bilateral relations with the recipient country". See *Japan's Official Development Assistance Policy White Paper 2011*, p. 135.

development assistance and conveys its deep concern to the recipient country regarding the status of democratization and human rights.[53]

54. In line with its Initiative on Gender and Development, Japan endeavours to ensure that a gender perspective is integrated into all aspects of its development assistance. According to an OECD-DAC assessment of support for gender equality and women's empowerment, in 2011, Japan allocated US$ 160 million of its ODA to activities that aim primarily to support gender equality and women's empowerment, while an additional US$ 1,851 million was allocated for activities in which gender equality was an important, but secondary, objective.[54] Although Japanese gender equality-focused aid increased significantly from around 6 per cent of all sector-allocable aid in 2002 to 19 per cent in 2011, it still remained below the OECD-DAC average of 32 per cent.[55] Japanese efforts in the area of gender mainstreaming include cooperation with international aid organizations, NGOs, research institutions and raising awareness on gender related issues among Japanese development practitioners, including training of staff in ODA related ministries and agencies.

55. Japan also promotes human rights through financial support for the human rights activities undertaken by several United Nations entities, such as the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF) and UN-Women. In 2010, for example, it contributed about US$ 5 million to UN-Women, while in 2012, it contributed significantly less — US$ 946,809.[56] In addition, its voluntary contributions to OHCHR (US$ 577,226 in 2012) have fallen. The Independent Expert urges the Government of Japan to scale up its financial support to United Nations agencies so as to enhance their effectiveness and efficiency.

56. While to a large extent development cooperation aims to assist in realizing economic, social and cultural rights, development projects may also have negative human rights impacts. In particular, large-scale infrastructure projects, such as dams, mining, oil and gas exploitation, industry, energy plants, highways or airports, can have a negative impact on communities and individuals living in the project area or region.

C. Attainment of the Millennium Development Goals

57. Japan has been a leading actor in promoting the Millennium Development Goals (MDGs) at the international level. In recent years, it has made particular efforts to support the attainment of Goals related to education and health care. At the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals in September 2010, Japan pledged US$ 5 billion in assistance to the health sector and US$ 3.5 billion to the education sector to contribute to efforts for the realization of the MDGs.[57] In June 2011, it hosted an MDG follow-up meeting jointly with the United Nations.

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[53] *Japan's Official Development Assistance Policy White Paper 2011*, p. 136.

[54] See OECD, "Aid in Support of Gender Equality and Women's Empowerment – Donor Charts", March 2013, p. 17. Available from www.oecd.org/dac/stats/Aid%20in%20support%20ENG%20for%20web%20March%202013.pdf.

[55] Ibid., pp. 4 and 17.

[56] UN-Women, *Annual Report 2012-2013*, p. 26. Available from www.unwomen.org/~/media/Headquarters/Attachments/Sections/Library/Publications/2013/6/UNwomen-AnnualReport2012-2013-en%20pdf.pdf.

[57] See *Japan's Global Health Policy 2011-15*, September 2010. Available from www.mofa.go.jp/policy/oda/mdg/pdfs/hea_pol_ful_en.pdf. See also *Japan's Education Cooperation Policy, 2011-15*, September 2010. Available from

58. Japan is also active in the discussions concerning the post-2015 development framework. The Independent Expert welcomes the fact that, in the context of the post-development framework, Japan aims to promote universal access to basic health-care services, to close the gap in access to health services between wealthy and poor people, to shift health care from a disease-oriented to a people-centred approach, and therefore to promote universal health coverage in order to satisfy broader health and medical needs.[58]

59. In the context of the discussions on the post-2015 framework, Japan has proposed a new development framework guided by the principle of human security. Although that principle recognizes the interlinkages between peace, development and human rights, its precise meaning remains unclear. This poses a problem in terms of operationalizing the principle. Furthermore, the Independent Expert considers that a human security approach may not, in itself, be sufficient to guarantee accountability for delivery on commitments in the new development framework.

60. It should be noted that the lack of an accountability mechanism for ensuring delivery on the declaratory, non-binding political commitments made by the international community in relation to the MDGs has been cited as a key reason for the inadequate progress on the Goals. Thus, it has been suggested that a post-2015 development agenda should be underpinned by human rights as a universal normative and legally binding framework embodying the minimum requirements of a life in dignity. The Independent Expert agrees. In his report to the 2013 General Assembly (A/68/542), he underscored the fact that a major shortcoming of the existing development goals is that they largely failed to integrate existing human rights obligations. He also noted that the accountability framework for the Goals, which consists of voluntary monitoring and reporting at the national level and United Nations reports on regional and global progress, is largely detached from national and international human rights accountability mechanisms. Consequently, States can report on their progress without reference to their human rights obligations and without taking into consideration the outcomes of the scrutiny of their human rights performance as undertaken by the treaty monitoring bodies.

61. The Independent Expert therefore encourages the Government of Japan to give due consideration, in the discussions concerning the post-2015 development framework, to the need for accountability mechanisms anchored to the international human rights framework which promote the active and meaningful participation of those most affected by poverty and deprivation and increase the responsiveness of the State or those in authority.

62. It is notable that accountability is a key feature of the human rights-based approach to development. From the human rights viewpoint, accountability refers to the relationship between duty bearers and the rights holders who are affected by their decisions, actions and omissions. It requires the Government and other duty bearers to take responsibility for their decisions, actions and omissions, to answer for them by explaining or justifying them to the public or those affected, and to be subject to some kind of enforceable sanction if their conduct has resulted in human rights violations.[59] Accountability also enables rights holders to access fair and transparent mechanisms to enforce their claims against duty bearers, and to obtain appropriate redress when their rights have been infringed. In that way, accountability enhances policymaking and delivery of services.

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www.mofa.go.jp/policy/oda/mdg/pdfs/edu_pol_ful_en.pdf.

[58] See Shinzo Abe, "Japan's strategy for global health diplomacy: why it matters", *The Lancet*, vol. 382 (14 September 2013), pp. 915–916.

[59] See OHCHR and Center for Economic and Social Rights, *Who will be accountable? Human Rights and the Post-2015 Development Agenda*, 2013, HR/PUB/31/1, p. 10. Available from www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf.

D. The need for a human rights-based approach

63. The Independent Expert considers that human rights could occupy a more prominent place in Japanese international development cooperation policy. In particular, the Government should make a more explicit commitment to incorporating human rights principles into the design, implementation and monitoring of its ODA policies by adopting a policy statement on human rights and development cooperation. Other leading providers of ODA, such as the Canadian International Development Agency, the Ministry of Foreign Affairs of Finland, Germany (BMZ/GIZ), the Swedish International Development Cooperation Agency, the Department for International Development of the United Kingdom of Great Britain and Northern Ireland and the United States Agency for International Development have done so.[60] Such a policy statement should be complemented by operational and implementation guidelines, related manuals and practical tools, as well as human rights training for Japanese officials working in the area of development cooperation.

64. A human rights-based approach guiding development cooperation policies and programmes promotes equality and non-discrimination, participation and empowerment, as well as transparency and accountability. It views the people as agents of their own development and brings about a shift in perspective: those in need and target groups are seen as bearers of rights and State partners as bearers of duties. A human rights-approach to development includes both support to State institutions as duty bearers, to enable them to meet their obligations, and assistance and empowerment of rights holders and civil society to ensure that they can claim their rights.

65. In the context of Japanese international development cooperation, a rights-based approach would require that human rights principles of equality and non-discrimination, participation, empowerment, transparency and accountability are reflected at all stages of formulation, implementation, monitoring and evaluation of all development cooperation policies. A rights-based approach would also prioritize support to those social groups that are most affected by discrimination: women, children, persons with disabilities, indigenous peoples and minorities. It is oriented at eliminating the structural causes of poverty, social exclusion and violent conflicts, and is compatible with the Japanese human security agenda. Meaningful participation can ensure that the interests of affected individuals are reflected in decision-making and that clashes of interest can be solved in a peaceful manner. Strengthening justice mechanisms, including non-judicial mechanisms, and ensuring that all people have access to them, also helps to resolve disputes peacefully. By ensuring non-discrimination, equity, participation and effective access to remedies and by focusing on the root causes of poverty and underdevelopment, a rights-based approach would improve the sustainability and effectiveness of Japanese development cooperation.

66. Finally, by adopting a human rights-based approach, Japan would be aligning its development cooperation policies and programmes with its international human rights obligations and other relevant international policy statements on human rights and development, such as the 2007 OECD-DAC action-oriented policy paper on human rights and development.

[60] For a recent comparative analysis, see World Bank and Organisation for Economic Co-operation and Development, *Integrating Human Rights into Development Cooperation: Donor Approaches, Experiences, and Challenges*, 2nd ed. (Washington D.C., World Bank, 2013), pp. 3–22.

VI. Conclusions and recommendations

67. **Japan has a commendable international development cooperation programme. Despite the fiscal challenges it has faced in recent years as a consequence of the global economic crisis and the natural disasters it has suffered, it continues to accord importance to development cooperation. However, its development cooperation policy could be further enhanced through, inter alia, an explicit commitment to integrating a human rights-based approach into the formulation, implementation and monitoring of the programme.**

68. **In view of the above, the Independent Expert recommends that the Government of Japan should:**

(a) Put human rights at the core of its development cooperation programme by adopting a human rights-based approach. This would require, inter alia, making a more explicit commitment to incorporating human rights principles into the design, implementation, monitoring and evaluation of its ODA policies and programmes, as well as the development of operational and implementation guidelines, related manuals and practical tools and human rights training for Japanese officials working in the area of development cooperation.

(b) Enhance its financial support to civil society organizations involved in the promotion and protection of human rights, particularly economic, social and cultural rights, in the countries receiving Japanese development assistance.

(c) Take measures to ensure that efforts aimed at promoting Japanese investments abroad are consistent with relevant international human rights standards, including the guiding principles on foreign debt and human rights, the Guiding Principles on Business and Human Rights and relevant international labour standards.

(d) Take measures to ensure more comprehensive regulation of Japanese foreign business activities in order to address issues such as tax evasion and other forms of capital flight which undermine the capacity of countries to mobilize sufficient domestic resources for their development.

(e) Continue to support multilateral and bilateral debt relief initiatives and consider measures that can deliver an equitable and durable solution to the debt crisis.

(f) Consider enacting legislation to limit the ability of vulture funds to use Japanese courts to recover extortionate amounts from poor countries.

(g) Use its influence in international financial institutions, such as the World Bank, the International Monetary Fund and the Asian Development Bank, to ensure that the provision of loans or debt relief is not conditional on the implementation of onerous policies that may undermine the sustainability and ownership of the development efforts of recipient countries. This would be consistent with the principle of ownership underscored in Japanese ODA policies and the Accra Agenda for Action.

(h) Strengthen the accountability mechanisms and safeguard policies of JICA, NEXI and JBIC by, inter alia, requiring comprehensive human rights impact assessments, in addition to environmental and social impact assessments, as well as the free, active and meaningful participation of affected individuals and communities. In particular, the safeguard policies should be clearly aligned with the Guiding Principles on Business and Human Rights.

(i) Adopt a clear road map for achieving the United Nations ODA/GNI target of 0.7 per cent as the economic situation in Japan improves.

(j) Work towards ensuring that the post-2015 development framework of the United Nations includes a robust framework to ensure accountability for the delivery of commitments.